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No. 88-1621

In the Supreme Court of the United States

OCTOBER TERM, 1988

ROSARIO GAMBINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's counsel had a conflict of interest that adversely affected petitioner's defense at trial.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	11
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Berenyi v. *Immigration Director*, 385 U.S. 630 (1967)	17
Burger v. *Kemp*, 107 S. Ct. 3114 (1987)	11, 12, 15
Cuyler v. *Sullivan*, 446 U.S. 335 (1980)	11, 12
Government of the Virgin Islands v. *Zepp*, 748 F.2d 125 (3d Cir. 1984)	6
Holloway v. *Arkansas*, 435 U.S. 475 (1978)	12
NCAA v. *Board of Regents*, 468 U.S. 85 (1984)	17
Oliver v. *Wainwright*, 782 F.2d 1521 (11th Cir.), cert. denied, 479 U.S. 914 (1986)	12
Strickland v. *Washington*, 466 U.S. 668 (1984)	11, 14
United States v. *Fahey*, 769 F.2d 829 (1st Cir. 1985)	12

Statutes and rule:

21 U.S.C. 841(a)(1)	2
21 U.S.C. 843	2
21 U.S.C. 846	2
21 U.S.C. 848 (1982 & Supp. V 1987)	2
28 U.S.C. 2255	*passim*
Fed. R. Crim. P. 33	4, 5

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-45) is reported at 864 F.2d 1064, and the opinion of the district court (Pet. Supp. App. 46-62) is unreported. The opinion of the court of appeals on petitioner's direct appeal of his conviction (Pet. Supp. App. 63-98) is reported at 788 F.2d 938.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1988, and a petition for rehearing was denied on January 31, 1989. The petition for a writ of certiorari was filed on March 31, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of conspiracy to distribute heroin, in violation of 21 U.S.C. 846; two counts of possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); two counts of distribution of heroin, in violation of 21 U.S.C. 841(a)(1); and one count of using a telephone to facilitate a conspiracy to distribute heroin, in violation of 21 U.S.C. 843. Petitioner was sentenced to an aggregate term of 45 years' imprisonment, a 20-year special parole term, and a $105,000 fine. The court of appeals affirmed (Pet. App. 2-3; Pet. Supp. App. 63-98). Petitioner then filed a motion for relief under 28 U.S.C. 2255. After a hearing, the district court denied the motion (Pet. Supp. App. 46-62i), and the court of appeals affirmed (Pet. App. 1-45).

1. Petitioner's conflict-of-interest claim in this case relates solely to his conviction on Counts 11 and 12 of the indictment, which charged him with possession of heroin with intent to distribute it and distribution of heroin in connection with a sale to an undercover FBI agent in Atlantic City on January 18, 1984. Pet. App. 2-3.[1] The evidence at trial concerning that transaction is set forth in the opinion of the court of appeals on petitioner's direct

[1] Petitioner does not allege that his attorney had a conflict of interest regarding any of the other counts on which he was convicted. Those counts charged petitioner with possession with intent to distribute heroin and distribution of heroin at Somers Point, New Jersey, on or about February 20, 1984 (Counts 17 and 18); conspiracy to distribute heroin from at least as early as October 1, 1983, until on or about March 16, 1984 (Count 2); and use of a telephone at Cape May, New Jersey, on or about January 30, 1984, to facilitate the distribution of heroin (Count 13). Pet. App. 2-3. Petitioner was acquitted on a count charging that he engaged in a continuing criminal enterprise, in violation of 21 U.S.C. 848 (1982 & Supp. V 1987). Pet. Supp. App. 62e.

appeal (Pet. Supp. App. 71-74) and in the government's brief on appeal from the district court's denial of petitioner's motion under Section 2255. It showed that on January 17, 1984, two of petitioner's co-defendants, Anthony Spatola and Antonio Gambino, were trying to obtain heroin to sell to the undercover agent the next day. Spatola, who is petitioner's cousin, and Giovanni Bosco, another co-conspirator who was a fugitive at the time of trial, met at the Caffe Milano in Brooklyn at approximately 2:27 p.m. on January 17, apparently to discuss the proposed sale. Thirteen minutes later, a yellow Mercedes Benz usually driven by petitioner was seen leaving the curb in front of the Caffe Milano. Shortly thereafter, in a recorded conversation, Spatola told Antonio Gambino that he had talked with petitioner, who in turn had left to see if he could obtain heroin. In a subsequent recorded conversation, Spatola confirmed to Antonio Gambino that as a favor, petitioner could obtain half of the heroin they needed. That information was relayed by Antonio Gambino to the undercover FBI agent. In each of the conversations, petitioner's co-conspirators referred to petitioner as "the short guy." Pet. App. 3, 71-72; Gov't C.A. Br. 8-9.

Later on January 17, Spatola told Antonio Gambino that the heroin would arrive at the Caffe Milano between 11:00 and 11:30 that night. At 11:19, petitioner's yellow Mercedes Benz arrived at the Caffe Milano, and at 11:29, it departed. During a recorded conversation early the next morning, Spatola told Antonio Gambino that "Sarino"—another nickname for petitioner—was not making any money on this deal because he had to obtain the heroin elsewhere and was providing it as a favor. A few hours later, Spatola and Bosco sold the heroin to undercover FBI agents in a hotel room in Atlantic City. After leaving the hotel, Spatola, Bosco, and Antonio Gambino drove to

petitioner's home, where the Mercedes Benz was parked. Pet. Supp. App. 72-73; Gov't C.A. Br. 10-11.

During negotiations to arrange a second purchase of heroin from petitioner and his co-conspirators, a number of telephone calls were made to petitioner, and in other recorded conversations the parties referred to petitioner by his code names. After the second sale, petitioner's home was searched. Two of the bills used by the FBI to make the second purchase were found in petitioner's home. Pet. Supp. App. 73-74; Gov't C.A. Br. 11-14.

2. Following his conviction, and while his appeal was pending, petitioner filed a motion for a new trial under Fed. R. Crim. P. 33 based on newly discovered evidence. In support of the motion, petitioner produced, *inter alia,* documents from *United States* v. *Badalamenti,* No. 84-Cr-286, a large-scale narcotics prosecution in the Southern District of New York, as well as surveillance logs furnished to defense counsel at petitioner's trial and in the *Badalamenti* case (Pet. Supp. App. 92-94). The surveillance logs showed that Gaetano Mazzara, a defendant in *Badalamenti,* had been present at the Caffe Milano on January 17, 1984, the same day that Spatola, Bosco, and Antonio Gambino obtained the heroin there. Specifically, the logs showed that Mazzara arrived at 2:58 p.m., entered the Caffe Milano at 3:00 p.m., entered a nearby tile store at 3:09 p.m., and left the scene at 3:41 p.m. (Pet. App. 5). The documents in the *Badalamenti* case also suggested that the government had at one time suspected that Mazzara was the source of the heroin that was delivered to Spatola, Bosco, and Gambino on that date (*id.* at 9; Pet. Supp. App. 88).

The district court denied petitioner's motion for a new trial (C.A. App. A674-A683). The court first held that the evidence was not "newly discovered," because it was available to the defense in the exercise of due diligence (*id.* at A675-A678). But the court further concluded that the evi-

dence did not in any event furnish a basis for relief under Rule 33. Of particular relevance here, petitioner relied on a footnote in the government's memorandum concerning a severance motion in *Badalamenti* stating that "Castronovo [a Mazzara associate] and Mazzara arranged for the delivery of heroin to a *Gambino* representative at the Caffe Milano" on January 17, 1984; the court observed that "[petitioner's] argument that this conclusory statement is somehow exculpatory (notwithstanding the reference to Gambino) rests largely upon a contention that the statement contradicts the government's version of the offense which portrayed [petitioner] as the supplier of the heroin sold" (*id.* at A680-A681). The court noted, however, that the evidence at trial showed that the defendants were unable to obtain heroin from their usual source on January 17, 1984, and that they had obtained the heroin from someone else as a favor (*id.* at A681). Against this background, the district court concluded that "the cited footnote from the *Badalamenti* severance memorandum not only is not impeachment material; it now identifies Castronovo and Mazzara as the persons from whom [petitioner] obtained the heroin for the January 17 sale" (*ibid.*). Furthermore, in the court's view, "[t]he evidence implicating [petitioner] was so clear and striking * * * that strong evidence indeed would be required to turn the tide" and warrant the granting of a new trial (*id.* at A682).

3. On the direct appeal of his conviction, petitioner relied on the evidence submitted in the Rule 33 proceedings to argue that his attorney, Jacob Evseroff, had a conflict of interest because he represented Mazzara in the *Badalamenti* case.[2] Petitioner contended that Evseroff had an actual conflict of interest that adversely affected

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[2] The court of appeals affirmed the district court's denial of the Rule 33 motion (Pet. Supp. App. 92 n.18).

his performance because Evseroff did not present the defense that it was Mazzara, rather than petitioner, who was the source of the heroin that was the subject of Counts 11 and 12 of the indictment (Pet. Supp. App. 94-97). The court of appeals declined to resolve that issue because of its general rule that conflict-of-interest claims are not cognizable on direct appeal (*id.* at 88-97). In the court's view, this case did not fall within the limited exception to that rule announced in *Government of the Virgin Islands* v. *Zepp,* 748 F.2d 125 (3d Cir. 1984), which allows consideration of such claims on direct appeal " 'where the record clearly shows actual conflict of interest and objections made at trial did or should have put the trial court on notice that potential conflict of interest existed' " (Pet. Supp. App. 89-90, quoting *Zepp,* 748 F.2d at 134). Applying that standard, the court found that although petitioner's showing suggested that attorney Evseroff had a potential conflict of interest, the record did not show an actual conflict, since "[b]oth parties have advanced various, plausible interpretations of the trial strategy employed by Mr. Evseroff at [petitioner's] trial" (Pet. Supp. App. 97). The court therefore affirmed petitioner's conviction without prejudice to his right to raise the conflict-of-interest claim in collateral proceedings under 28 U.S.C. 2255 (Pet. Supp. App. 97).

4. a. Petitioner then filed a motion under 28 U.S.C. 2255, again alleging that his attorney had an actual conflict of interest that adversely affected his performance. In support of that motion, petitioner relied on the government's surveillance logs showing that Mazzara was at the Caffe Milano for approximately 45 minutes on the afternoon of January 17. Petitioner also submitted an affidavit signed by Evseroff stating that although he was aware that there was a "substantial argument" that Mazzara was the source of the heroin sold to the undercover agents in Atlantic City on January 18, 1984, he had carefully

avoided questioning the agents who had conducted surveillance of the Caffe Milano on January 17 out of a sense of loyalty to Mazzara and for fear that he might jeopardize Mazzara's position at his impending trial in the *Badalamenti* case. The affidavit also stated that Evseroff had not called petitioner's attention to the possible argument that Mazzara was the source of the heroin. Pet. App. 4-5; Pet. Supp. App. 52-53.

Evseroff's testimony at the hearing on petitioner's motion under 28 U.S.C. 2255 differed from the statements in the affidavit. Thus, Evseroff testified that he had not cross-examined the surveillance agents about Mazzara's presence or sought additional information about Mazzara's involvement in the episode because it would have been a "specious argument" to contend that Mazzara was the source of the heroin (Pet. App. 5-6). Evseroff also stated that while there was evidence suggesting that Mazzara was the source of the heroin, it was not sufficient to make a "substantial argument" to that effect (*id.* at 6), because the only information he had at the time was that Mazzara had been at the Caffe Milano eight hours before the delivery took place (*id.* at 7). By the same token, Evseroff testified that he believed he had presented a persuasive defense to the charges against petitioner arising out of the January 17 episode, resting on the lack of evidence that petitioner was in Brooklyn that day, defense evidence that someone else was using his car, and Spatola's testimony that he had received the heroin from another person (the "Little Baron"); Evseroff explained that he had not wished to undercut or confuse that defense—and particularly Spatola's testimony—by introducing the alternative possibility that Mazzara was the source of the heroin (*id.* at 7-8). Evseroff also stated that he had not brought his representation of Mazzara to the attention of the trial judge during petitioner's trial because he did not perceive any conflict of interest in the multiple representa-

tion (*id.* at 6). Finally, Evseroff explained that another attorney had drafted the affidavit upon which petitioner relied, and that Evseroff had declined to sign an earlier version of the affidavit because it stated that Mazzara was the source of the heroin (*id.* at 6-7).

b. After considering the foregoing evidence, the district court denied petitioner's motion for relief under Section 2255 (Pet. Supp. App. 46-62i). The court accepted Evseroff's explanation that he decided not to raise the possibility that Mazzara was the source of the heroin in order to avoid undercutting petitioner's best defense at trial (*id.* at 62a-62b), which featured Spatola's testimony that the heroin had been furnished by someone else (*id.* at 62d). The court found it significant in this regard that Evseroff's trial strategy had succeeded in obtaining an acquittal for petitioner on the most serious charge in the indictment, which alleged that he engaged in a continuing criminal enterprise (*id.* at 62e). The court also noted that raising a "Mazzara defense" might have caused the government to come forward with rebuttal evidence that petitioner and Mazzara were both involved in the January 17 heroin delivery (*id.* at 62b-62c, 62f), especially since the evidence showed that the Gambino group had to look to another source for the heroin that was the subject of that delivery (*id.* at 62g-62h).

The district court attached "little weight" to the "brief, oversimplified" statements in the affidavit signed by Evseroff (Pet. Supp. App. 58), because Evseroff had not drafted the affidavit himself, because circumstances indicated that Evseroff might have been pressured to sign it "in order to overturn the conviction of the man proved at trial to be at the apex of the conspiracy and distribution of heroin by the Gambino family in New Jersey" (*id.* at 59), and because Evseroff's testimony at the hearing, where the court had an opportunity to observe his demeanor, was

credible and established that he had exercised his best professional judgment in not pursuing the Mazzara defense (*id.* at 58-59, 60, 62c). In particular, the court credited petitioner's explanation of the comment in the affidavit that he had not sought to implicate Mazzara because of "loyalty" to him; the court was satisfied that Evseroff simply meant that it would have been unfair to Mazzara to cast him as the source of the heroin on such "flimsy evidence" as that furnished by the surveillance log showing that he was present at the Caffe Milano eight hours before the scheduled heroin delivery (*id.* at 62a-62b). For these reasons, the district court concluded that Evseroff did not have an actual conflict of interest at trial (*id.* at 62g).

5. A divided panel of the court of appeals affirmed, with each judge writing separately (Pet. App. 1-45). In an opinion announcing the judgment of the court (*id.* at 2-19), Judge Greenberg, after extensively reviewing the record of the Section 2255 proceedings (*id.* at 4-10) and accepting the district court's factual findings (*id.* at 10-12, 15-17 & nn. 3, 5), concluded that Evseroff did not labor under an actual conflict of interest. First, Judge Greenberg noted that Mazzara would not have been prejudiced by the outcome of petitioner's case, so Evseroff had no reason to sacrifice petitioner's interests to benefit Mazzara. Second, Judge Greenberg observed that the record indicated that Evseroff failed to raise the "Mazzara defense" because he believed it was "specious" and might undermine petitioner's overall defense; his failure to raise that defense was not due to his representation of Mazzara in the *Badalamenti* case (Pet. App. 15-18). Judge Greenberg further stated that even if the multiple representation created an actual conflict of interest, it did not adversely affect Evseroff's performance because it was "evident from Evseroff's reasoning as to why he did not raise the

Mazzara defense, that he would not have advanced it even if Mazzara had never been his client" (*id.* at 18).

Judge Sloviter agreed that petitioner was not entitled to relief, but she reached that conclusion on different grounds. She reasoned that the court of appeals' decision on petitioner's direct appeal established that petitioner had not then produced sufficient evidence to meet the standard of *Zepp,* which allows the court to consider conflict-of-interest claims on direct appeal when a defendant has shown the existence of an actual conflict (Pet. App. 19-23). Because, in Judge Sloviter's view, petitioner had adduced no new evidence in support of his Section 2255 motion, she regarded the court's prior decision that petitioner had not shown an actual conflict of interest to be dispositive of the same issue in the Section 2255 proceedings (*id.* at 21). Furthermore, Judge Sloviter concluded that the court of appeals was bound by the district court's findings and credibility determinations that Evseroff had valid, tactical reasons for pursuing the course he did (*id.* at 22-23).

Judge Mansmann dissented (Pet. App. 24-45). She rejected Judge Sloviter's position that the court's prior decision disposed of the conflict-of-interest issue on the current appeal, because, in her view, the prior appeal simply addressed the procedural issue whether the record was adequate to address petitioner's claim (*id.* at 24-25). On the merits, Judge Mansmann agreed with the majority with respect to the legal standard to be applied (*id.* at 24 & n.2), but she disagreed with the application of that test to the facts of this case. In particular, Judge Mansmann found it "astonishing" that a defense attorney would not raise the fact that Mazzara, apparently a known heroin dealer, was in the vicinity on the day the heroin was delivered (*id.* at 26). In addition, she observed that "it is a familiar trial tactic to argue in the alternative," and that

Evseroff therefore could have presented both the Mazzara defense and other exculpatory testimony that someone else was the source of the heroin (*id.* at 28-29).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Petitioner does not challenge the legal standard, drawn directly from *Cuyler* v. *Sullivan,* 446 U.S. 335 (1980), under which all three members of the panel below reviewed his conflict-of-interest claim. Petitioner objects only to the application of that legal test to the particular circumstances of this case. That fact-bound issue does not warrant review by this Court.

1. Petitioner's principal contention is that his attorney's simultaneous representation of Gaetano Mazzara in the *Badalamenti* case and petitioner in the New Jersey case gave rise to a conflict of interest that requires his conviction to be vacated. He argues (Pet. 22-29, 37-40) that a reasonable defense counsel not faced with a conflict of interest would have pursued a defense based on Mazzara's presence at the Caffe Milano on the day the heroin was delivered.

The legal principles governing petitioner's claim are well established and are not challenged by petitioner here. In cases of multiple representation, a defendant challenging his conviction on conflict-of-interest grounds must show that his attorney " 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.' " *Burger* v. *Kemp,* 107 S. Ct. 3114, 3120 (1987), quoting *Strickland* v. *Washington,* 466 U.S. 668, 692 (1984); see also *Cuyler* v. *Sullivan,* 446 U.S. 335, 348, 350 (1980). Moreover, the courts generally presume that counsel "is fully conscious of the overarching

duty of complete loyalty to his or her client," and they "appropriately and 'necessarily rely in large measure upon the good faith and good judgment of defense counsel.' " *Burger* v. *Kemp*, 107 S. Ct. at 3120, quoting *Cuyler* v. *Sullivan*, 446 U.S. at 347. In addition, where, as here, the attorney's clients are tried in separate proceedings, the potential for a divergence of their interests is " 'significantly reduced.' " *Ibid.* Finally, although a conflict of interest can be shown by counsel's failure to take action (see *Holloway* v. *Arkansas*, 435 U.S. 475, 489-490 (1978)), no conflict arises from an attorney's failure to pursue a defense if the decision to forgo the defense was plausible and not taken because of the attorney's other loyalties. *Burger* v. *Kemp*, 107 S. Ct. at 3120; see also *United States* v. *Fahey*, 769 F.2d 829, 836 (1st Cir. 1985); *Oliver* v. *Wainwright*, 782 F.2d 1521, 1524-1525 (11th Cir.), cert. denied, 479 U.S. 914 (1986).

The district court and all three members of the court of appeals panel specifically recited and applied the *Cuyler* v. *Sullivan* standard, which this Court reiterated in *Burger* v. *Kemp* and which required petitioner to show that his lawyer had an actual conflict of interest that adversely affected his performance. See Pet. Supp. App. 57, 62f (district court); Pet. App. 13 (Greenberg, J.); *id.* at 20 (Sloviter, J., concurring); *id.* at 24 & n.2 (Mansmann, J., dissenting). Petitioner satisfied neither prong of that test.

a. As Judge Greenberg and the district court found, petitioner's counsel reasonably decided that pursuing the Mazzara defense would have undermined the stronger defense actually presented, which involved establishing that another individual had supplied the heroin. The facts presented at trial and at the hearing on petitioner's Section 2255 motion fully support this conclusion. That evidence showed that Mazzara was observed at the Caffe Milano in the middle of the afternoon, while electronic surveillance

established that the heroin was going to be delivered at 11:00 to 11:30 in the evening, and a car associated with petitioner was seen at the restaurant at about that time. Thus, the government's evidence strongly suggested that Mazzara was *not* the immediate source of the heroin, and Evseroff reasonably determined that he must put on a defense that responded to the government's proof that the heroin was delivered at the Caffe Milano between 11:00 and 11:30 on January 17.

The necessary defense was supplied in part by Spatola's testimony at trial that he had received the heroin from another person. Evseroff provided support for that testimony by presenting evidence that petitioner was not driving his car that evening and by eliciting testimony that none of the 13 agents watching the Caffe Milano actually saw petitioner at that location on the afternoon or evening of January 17. Pet. App. 7-8. Under these circumstances, competent counsel could reasonably conclude that an attempt to show that Mazzara was the source of the heroin might confuse the jury, fail to respond adequately to the government's proof, and cast doubt on his primary defense. In fact, given the evidence that the defendants were unable to obtain the heroin from their usual source, the Mazzara defense could have led the jury to conclude that Mazzara furnished the needed heroin to petitioner and that *both* were involved in the transaction. Under this view of the evidence, it hardly would have helped petitioner's case, as petitioner now insists, for Evseroff to have called the jury's attention to evidence placing a major drug dealer at the location where the delivery occurred and where petitioner's car was seen on two occasions on the day of the delivery.

Thus, contrary to the view of Judge Mansmann in her dissenting opinion below, it would not have been a sound defense tactic for Evseroff to present an alternative de-

fense that the jury should find the heroin to have been supplied by Mazzara if it found that the heroin was not supplied by the person identified by Spatola. As the district court found, Evseroff did not have a conflict of interest, because "[i]t was completely consistent with Evseroff's representation of both clients that he not launch blindly a 'Mazzara defense' in the Gambino litigation. The interests of [petitioner] were best served by this decision and the defense developed for him was a good one, had the witnesses supporting it been believed" (Pet. Supp. App. 62f-62g; see also Pet. App. 12 (Greenberg, J.)).

b. Even if Evseroff did labor under an actual conflict of interest, the record and findings below establish that his defense of Evseroff was not adversely affected. Evseroff's reasons for not putting on the Mazzara defense, which were credited by the district court and the majority of the court of appeals, establish that the Mazzara defense was not raised "because * * * it would have been foolish to do so" and that Evseroff "would not have advanced [the defense] even if Mazzara had never been his client" (Pet. App. 17, 18 (Greenberg, J.)).[3]

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[3] Petitioner repeatedly faults Evseroff for not conducting an "investigation" into the Mazzara defense. See Pet. 13, 22, 24, 38, 39. However, even with the benefit of a new lawyer and an opportunity for a hearing in these proceedings under Section 2255, petitioner has not identified any additional evidence—beyond the surveillance logs placing Mazzara at the Caffe Milano eight hours before the delivery took place and the statement in the *Badalamenti* filing that Mazzara was a suspected source—that would affirmatively support an argument that Mazzara in fact was the source of the heroin. More important, petitioner points to no evidence that suggests that Mazzara was the source of the heroin to the exclusion of petitioner. A lawyer cannot be faulted for not conducting an investigation when the facts known to him, including those furnished by the defendant, do not reasonably suggest that such a course would be fruitful. See *Strickland* v. *Washington*, 466 U.S. at 690-691.

c. This Court stressed in *Burger* v. *Kemp* that in the context of a conflict-of-interest charge, when the lower courts have found that the lawyer has performed his solemn duties, respect for the bar and the deference due the shared conclusion of two reviewing courts prevent this Court from substituting its speculation for the considered opinions of the lower courts. 107 S. Ct. at 3121. This is so, the Court explained, because "[t]he District Judge, who presumably is familiar with the legal talents and character of the lawyers who practice at the local bar and who saw and heard the witnesses testify, is in a far better position * * * to evaluate a charge of this kind, and the regional Courts of Appeals are in a far better position * * * to conduct appellate review of these heavily fact-based rulings." *Ibid.* Those considerations are equally applicable here, and indeed petitioner concedes (Pet. 37) that the disposition of this case turned on the "heavily fact based finding below," including "findings of credibility."[4]

2. Petitioner objects (Pet. 16-17, 29-30) to certain actions of the government after trial that he believes might have affected Evseroff's testimony. Petitioner relies on the fact that the government referred the conflict-of-interest allegation to the disciplinary committee of the New York

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[4] Petitioner seeks to impeach the district court's findings on the ground that the Section 2255 proceedings were conducted by Judge Bissell, who did not preside at petitioner's trial. See Pet. 31-32. However, petitioner ignores the fact that Judge Lacey, who did preside at petitioner's trial, made similar findings when he denied petitioner's motion for a new trial based on essentially the same evidence. Judge Lacey concluded that the assertedly "new" evidence of Mazzara's presence at the Caffe Milano would not have affected the verdict, in part because it would have supported the inference that both Mazzara and petitioner were involved in supplying the heroin. See page 5, *supra*. Moreover, Judge Bissell did conduct a hearing on petitioner's motion under Section 2255, and he had an opportunity in that hearing to observe the demeanor of Evseroff and to weigh all of the evidence.

bar, informed Evseroff that it would object to his appearance pro hac vice in another case in the district court because of those allegations, and subpoenaed Evseroff's income tax returns and records of his financial dealings with petitioner and Mazzara. Judge Greenberg sufficiently answered this objection (Pet. App. 18-19):

> The government's actions are significant to this appeal only insofar as they impacted on Evseroff's credibility at the [Section 2255] hearing. But Judge Bissell believed Evseroff's testimony and there is no reason why he was wrong in this as it was quite logical. It must be further pointed out that in view of the content of Evseroff's affidavit it was certainly appropriate for the government to bring the matter to the grievance committee's attention and to object to his admission *pro hac vice* in New Jersey. While the subpoena for his tax returns is more questionable, the government quite plausibly points out that it was interested in showing from the returns and from Evseroff's income records that [petitioner], as a client, was financially more significant to Evseroff than Mazzara.

Judge Sloviter also accepted the district court's judgment that Evseroff's credibility was unaffected by the actions of the government to which petitioner objects and that the government had given a plausible explanation for them. See Pet. App. 23 (Sloviter, J., concurring).[5] The district court, which heard Evseroff's testimony, discounted Evseroff's prior affidavit and credited his testimony at the hearing about his reasons for declining to pur-

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[5] Even Judge Mansmann, in dissent, noted without disagreement on this point that the district court "accepted a plausible explanation the government made for its actions." Pet. App. 32-33 n.5 (Mansmann, J., dissenting)).

sue the Mazzara defense and the circumstances surrounding his signing of the affidavit. Since Evseroff's testimony on these points was entirely reasonable and the panel below accepted the district court's credibility findings on this score, the factual issues concerning the government's actions prior to the Section 2255 hearing do not warrant review by this Court. *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635 (1967); *NCAA* v. *Board of Regents,* 468 U.S. 85, 98 n.15 (1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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